Supreme Court, U.S.
FILED

99 83 JUL 12 1999

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1998

VINCENTE MEDINA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PATRICK JOYCE
FASULO, FREIDSON & JOYCE
Attorney for Petitioner
233 Broadway
Suite 780
New York, New York 10020
(212) 566-7299

PRINTINGHOUSE PRESS 25 WEST 43RD STREET NEW YORK, NY 10036 (212) 719-0990

4DRP

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court committed plain error by miscalculating the base level for sentencing the Defendant/Appellant?

2. Whether due to the nature of the reverse sting in which Mr. Medina was caught a downward departure should be granted as a matter of law?

3. Whether this particular case is one of those not adequately considered by the commission when the guidelines were promulgated?

4. Whether the Government should be permitted to pre-determine a sentencing guideline range regardless of a defendant's culpability?

5. Whether sentencing manipulation or entrapment should be permitted to enhance a defendant's sentence?

LIST OF PARTIES

The parties to the proceedings below were Petitioner Vincente Medina, Co-Defendant/Appellant Eric Calderon, and the United States of America.

TABLE OF CONTENTS

PAGE NO.

QUESTIONS PRESENTED FOR REVIEW i
LIST OF PARTIES ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
OPINION BELOW 1
JURISDICTION 2
PRELIMINARY STATEMENT 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 4

POINT I

THE DISTRICT COURT COMMITTED PLAIN ERROR AND AFFECTED A SUBSTANTIAL RIGHT BY MISCALCULATING THE BASE LEVEL SENTENCING. 4

POINT II

A REVERSE STING THEFT OPERATION CONSTITUTES A FORM OF SENTENCING ENTRAPMENT AND THUS WARRANTS A DOWNWARD DEPARTURE AS A MATTER OF LAW. 6

POINT III

A DOWNWARD DEPARTURE IS PERMITTED IN CASES NOT ADEQUATELY CONSIDERED BY THE COMMISSION IN PROMULGATING THE GUIDELINES. 8

TABLE OF CONTENTS cont'd

POINT IV

SENTENCING SHOULD CORRESPOND TO A DEFENDANT'S CULPABILITY AND NOT TO THE AMOUNT OF "BAIT" SET BY THE GOVERNMENT. 10

POINT V

THE FEDERAL CIRCUITS ARE CONFLICTED OVER THE ISSUE OF SENTENCING MANIPULATION AND ENTRAPMENT. THEREFORE THESE ISSUES NEED TO BE ADDRESSED BY THIS COURT. 11

CONCLUSIONS

FOR THE FOREGOING REASONS, THIS COURT SHOULD REMAND TO THE LOWER COURT FOR A RECALCULATION OF MEDINA'S SENTENCE UNDER THE FEDERAL SENTENCING GUIDELINES TAKING INTO ACCOUNT BOTH SENTENCING MANIPULATION OR ENTRAPMENT CLAIMS AND ACCEPTANCE OF RESPONSIBILITY. . . 14

APPENDIX A

Judgment and Opinion of the United States Court of Appeals for the Second Circuit. A1

APPENDIX B

Judgement of the United States District Court for the Eastern District of New York. A13

TABLE OF AUTHORITIES

CASE LAW PAGE

United States v. Atkinson, 297 U.S. 157 (1936 4

United States v. Baker, 63 F.3d 1478 (9th Cir.1995) cert. denied, 116 S. Ct. 824 (1996) 11n

United States v. Barth, 990 F.2d 422 (8th 1993) 13

United States v. Caban, 173 F.3d 89 (2nd Cir. 1999) 6,9

United States v. Cannon, 886 F. Supp. 705 (D.N.D. 1995) .. 13

United States v. Edenfield, 995 F.2d 197 (11th Cir. 1993) .. 11n

United States v. Genao, 831 F. Supp 246 (S.D.N.Y. 1993) .. 12

United States v. Garza-Juarez, 992 F.2d (9th Cir. 1993) ... 7, 8

United States v. Jones, 18 F.3d 1145 (4th Cir. 1994) 11

United States v. Knecht, 55 F.3d 54 (2nd Cir. 1995) 12

United States v. Martinez-Villegas, 993 F. Supp 766 (C.D.Cal. 1998) 7

United States v. Messino, 55 F.3d 1241 (7th Cir. 1995) 11n

United States v. Naranjo, 52 F.3d 245 (9th Cir. 1995) 7

United States v. Olano, 507 U.S. 725 (1993) 5

United States v. Staufer, 38 F. 3d 1103 (9th Cir. 1994) .. 10, 12

United States v. Warren, 16 F.3d 247 (8th Cir. 1994) 11

TABLE OF AUTHORITIES cont'd

UNITED STATES SENTENCING GUIDELINES

U.S.S.G. § 3E1.1 5

U.S.S.G. § 2D1.1 ..... 5, 6, 11

U.S.S.G. § 5K2.0 ..... 8,10, 11

STATUTES

18 U.S.C. § 1956(a)(3)(b) 12

18 U.S.C. § 924 (c) (1) 2, 4

28 U.S.C. 1254(1) 2

18 U.S.C. § 3553(a)(4) (1994) 6

18 U.S.C.§ 3553 (b) (1994) 9

18 U.S.C. § 3742(a)(2) 1

21 U.S.C. § 841 (b)(1)(a) 2,4

21 U.S.C. § 846 2,4

RULE

Fed. Rule Crim. P. 52b 4

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

VINCENTE MEDINA,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

The petitioner, Vincente Medina, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, rendered in this proceeding on April 12, 1999.

OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit affirmed the District Court's sentence of Mr. Medina. The initial appeal was brought pursuant to 18 U.S.C. § 3742(a)(2). The Second Circuit's opinion is cited as United States v. Caban, 173 F. 3d 89, Defendants/Appellants, No. 98-1205 (2d Cir., 4-12-99) and is attached hereto as Appendix A. The Judgment of the District Court is unreported. It is cited as United States v.

Vincente Medina, aka Pedro Pablo Contrera, CR 97-0337 (RR) and is attached hereto as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

PRELIMINARY STATEMENT

Vincente Medina appeals from judgments of conviction entered on April 3, 1997 in the United States District Court for the Eastern District of New York (Raggi, J.). Vincente Medina was named in a three-count superseding indictment, Cr. No. 97-337 (S-1) (RR), filed by the United States Attorney's Office for the Eastern District of New York. Count One charged that on or about and between February 1997 and March 27, 1997, Vincente Medina knowingly and intentionally conspired to possess cocaine with intent to distribute, in violation of 21 U.S.C. Section 841(b)(1)(a) and 846. Count Two charged that on or about and between February 1997 and March 27, 1997, Vincente Medina knowingly and intentionally attempted to possess cocaine with intent to distribute, in violation of 21 U.S.C Section 841 (b)(1)(a) and 846. Count Three charged that on or about March 27, 1997, Vincente Medina knowingly and intentionally used and carried a firearm during and in relation to a drug trafficking crime, to wit, the crimes charged in Counts One and Two, in violation of 18 U.S.C. Section 924(c)(1).

On September 15, 1997, Mr. Medina pled guilty to Counts One and Three of the superseding indictment before the Honorable Reena Raggi. On April 3, 1998, Honorable Reena Raggi sentenced Mr. Medina to a term of imprisonment of two hundred and seventy (270) months. Mr. Medina was sentenced two hundred and ten (210) months incarceration on the conspiracy charge, a consecutive sixty (60) months incarceration on the firearms charge, a five year term of supervised release, and a special assessment of $200.00.

Mr. Medina appeals the aforesaid sentence on the grounds that the district court should have assigned a sentencing base offense level of thirty-four, rather than thirty-six.

STATEMENT OF THE CASE

I. The Trial

The facts brought out at Medina's co-defendant's trial, relevant to the sentencing challenge, are as follows:

A. The Governments Case

On or about December 1996, while the New York Drug Enforcement Task Force ("NYDETF") was investigating robberies of drug stash houses, it learned from a confidential source that Miguel Caban led a group of people who robbed such locations. Accordingly, the NYDETF commenced an investigation into Caban's activities in early 1997.

On or about February 19, 1997, in a call recorded by NYDETF, a Drug Enforcement Administration ("DEA") confidential informant, Mark Tiwary, told Caban that he knew of a possible robbery target. As a result of this conversation, on March 27, 1997, Mark Tiwary met with Caban and was introduced to a second DEA informant, (the "Columbian"), who claimed to be a member of a Columbian drug organization, who knew where the drugs were being stashed and was willing to help Caban steal the drugs.

At the meeting, Caban told the informants how he had conducted robberies in the past and how much he had stolen. He stated that the largest theft in which he participated was a theft of 13 kilograms. Caban also noted that he had sold between 15 and 20 kilograms of narcotics in the past. The Columbian then informed Caban that there may be at least 50 kilograms of cocaine at the location which was targeted. It was then agreed that the Columbian would receive 25 kilograms and Caban would receive 25 kilograms of cocaine. Caban then informed his crew that they would each receive 5 kilograms of cocaine. On March 24, 1997 "the Columbian" called Caban and informed him that the cocaine would be in a warehouse in Brooklyn on March 27, 1997 and that

Caban should be ready. Defendant Medina was charged as being a crewmember in Caban's drug theft ring. Defendant and two co-conspirators were arrested while packaging real and sham cocaine that had been placed by the government at a purported "stash" house.

B. The Defendant's Plea

On September 15, 1997, Mr. Medina pled guilty to conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. Section 841 (b) (1) (a) and 846, and use of a firearm in connection with drug trafficking crime in violation of 18 U.S.C. Section 924 (c) (1).

The PSI assigned to Mr. Medina a base level offense of 36, based on the 50 kilograms of cocaine the group agreed to steal from the warehouse. United States Sentencing Guidelines (U.S.S.G.) Section 2D1.1 (c) (2) (U.S.S.G. establishes a base offense level of 36 for 50-150 kilograms of cocaine. The offense level was then adjusted downward for a total of 4 points to 32 reflecting Mr. Medina's acceptance of responsibility .

REASONS FOR GRANTING THE WRIT

Point I

THE DISTRICT COURT COMMITTED PLAIN ERROR AND AFFECTED A SUBSTANTIAL RIGHT BY MISCALCULATING THE BASE LEVEL SENTENCING.

The adjudication of the district court is reviewable for plain error under Rule 52(b). As the U.S. Supreme Court stated in United States v. Atkinson, 297 U.S. 157, 160 (1936), "[i]n exceptional circumstances, especially in criminal cases, appellate courts...may of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness of judicial proceedings." The U.S. Supreme Court has further clarified the test to determine whether a plain error exists. The three prongs of the test are: 1) error, which is 2) plain clear or obvious, and which 3) affects a

substantial right. U.S. v. Olano, 507 U.S. 725 (1993)

The Honorable Judge Reena Raggi committed plain error by miscalculating the base level of Medina's sentence under the Federal Sentencing Guidelines. It is clear that the base level for Medina's sentence should have been level thirty-four rather than level thirty-six. The original base level issued by the lower court was 36 and the court allowed a four-point reduction based on acceptance of responsibility under U.S.S.G. § 3E1.1. However, under U.S.S.G § 2D 1.1, Application Note 15,[1] the court may also downwardly depart the sentencing base level based on the defendants involvement in a "reverse sting" operation conducted by the government. This reduction, as clearly depicted in the guidelines, would recalculate Medina's initial base level at 34. With the court's further point reduction and with his criminal history of VI, his sentence could be as low as 168 months, a 42-month difference from the sentence that was imposed. Consequently, if Medina is subject to incarceration for 42 additional months, many of his substantial rights are affected.

The three-prong test, as stated in Olano, is clearly satisfied upon looking at the language of the record of the district court. The petitioner asks that the lower court's adjudication be remanded so that a downward departure can be applied to Medina's base level sentence and his period of incarceration can be reduced.

---

[1]If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.

Point II

A REVERSE STING THEFT OPERATION CONSTITUTES A FORM OF SENTENCING ENTRAPMENT AND THUS WARRANTS A DOWNWARD DEPARTURE AS A MATTER OF LAW

Under 18 U.S.C. § 3553(a)(4), the sentencing court must impose a sentence in accordance with the Guidelines that are in effect at the date of the defendant's sentence. The district court had explicit guidance from the Sentencing Guidelines to depart downward in situations of reverse sting operations, specifically recognizing such operations as inherently unjust and thus deserving of a reduction in sentence. See U.S.S.G. 2D1.1, Note Application 15.

The Honorable Justice Reena Raggi understood that she was allowed to depart in cases of "reverse stings" but stated that the facts of this case do not fall within the language of Application Note 15. The case at bar parallels the "reverse sting" operation explicitly mentioned within the Guidelines. Id. The only difference is that there was no drug sale, *per se*, only a drug theft. Moreover, the government was rigorously engaged in the theft, as it conducted all the major levels of the negotiations and the placement of the drugs in the warehouse. Medina and his codefendants had explained to the undercover agent that the largest quantity of drugs they had stolen in the past was 13 kilograms. Furthermore, the government solely controlled the amount of drugs within the warehouse by preparing 50 kilograms. The government enticed the defendants to steal the drugs by preparing the warehouse and the stash. As the Court of Appeals stated, "it is unsettling that in this type of reverse sting the government has a greater than usual ability to influence a defendant's ultimate Guidelines level and sentence." United States v. Caban, 173 F.3d at 93. It is also important to note that had the government arranged for a theft of 49.9 Kilograms of cocaine, Medina's sentence would have been substantially lower—possibly 78 months lower. Id. at Footnote 2. Such

aggressive law enforcement behavior has been characterized by several other Federal Circuits as entrapment warranting a mitigation in sentencing.

Other circuits have concluded that sentencing manipulation or sentencing entrapment occurs during reverse sting operations. For example, in United States v. Naranjo, 52 F.3d 245 (9th Cir. 1995) the court was presented with a case involving a reverse sting operation. After numerous unsuccessful attempts to get the defendant to sell drugs, the roles reversed and the government enticed the defendant into buying a certain quantity. Id at 246. The Ninth Circuit held that Note 12 or Note 15 of the Sentencing Guidelines were applicable. The court further stated that if the defendant did not intend to, and could not produce the amount of drugs negotiated, the court must deduct the unproduceable amount from the sentence determination. Id. at 250. The district court was instructed to rule upon the defendant's assertion regarding sentencing entrapment. Id at 249. There is no evidence in this record that suggests that Medina or his associates were predisposed to stealing or capable of selling the 50 kilograms of cocaine that the government planted.

The United States District Court for the Central District of California has also recognized a downward departure for sentence entrapment in addition to acceptance of responsibility. In United States v. Martinez-Villegas, 993 F.Supp 766 (1998), the court allowed for a mitigation of the sentence base level based on governmental misconduct. The facts of Martinez-Villegas are similar to the case at bar. Although the defendants were willing participants, the evidence failed to show that they were predisposed to transport the amount of cocaine in question. Id. at 776. The amount of cocaine that the government attributed to the defendants far exceeded any amount that they had attempted to transport in the past. Id. Therefore, the court realized that since the government controlled the majority of the circumstances, such misconduct was "tantamount to sentence entrapment and would warrant a downward departure in sentencing." Id. (quoting United States v. Garza-Juarez, 992 F.2d at 912-13). As a result, the court reduced the base level sentence from 36 to 26 (taking

into account, *inter alia*, a 2, 2, and 3 point reduction for sentencing entrapment, imperfect entrapment, and acceptance of responsibility, respectively). It is important to note that courts have also recognized that persuasion alone can amount to a downward departure based on sentencing entrapment. See Garza-Juarez, 992 F.2d at 912. Here, the defendant's coconspirators had indicated that they were only experienced in stealing, possessing, or sealing narcotics in a range from 13 to 20 kilos.

Based on the aforementioned cases, their holdings, and their extreme similarity to this case, the district court should have afforded Medina a downward departure. The inherent purpose of the Guidelines is to enforce proportionality of sentencing. A crucial error here is that while the Second Circuit courts have thwarted Medina's right, as a matter of a law, for a downward departure in reverse sting situations, other circuits have clearly permitted it.

Point III

A DOWNWARD DEPARTURE IS ALSO ALLOWED IN CASES NOT ADEQUATELY CONSIDERED BY THE COMMISSION IN PROMULGATING THE GUIDELINES.

If this court does not recognize that Application Note 15 parallels the case at bar, then it is still permitted to depart downward in cases not adequately accounted for by the commission. See U.S.S.G. §5K2.0.[2]The commission did not foresee cases like the one at hand. "Reverse stings" usually occur during the sale or purchase of drugs. Here, the government set up a sting involving the theft of drugs. When a situation arises that

---

[2]Under 18 U.S.C. § 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

was not anticipated by the commission, the sentencing court is permitted to depart from the guidelines. A departure will help the commission become aware of certain factors that need to be addressed. The Court of Appeals stated, "we invite the Sentencing Commission's attention to some more comprehensive measures that would consider what happens when a reverse sting involves a theft in which the government sets the bait (rather than a purchase in which the government sets the price)." This court should accept that invitation. The commission will only address this anomaly when courts take the affirmative step by departing from the guidelines, as they exist.

Both the sentencing court and the U.S. Court of Appeals were reluctant to apply Application Note 15. The Court of Appeals noted that "[a]pplication Note 15 of this section provides for a downward departure in a particular reverse sting situation that is not an issue here." United States v. Caban, 173 F.3d 89, 92 (1999). However, they included a caveat concerning reverse sting operation and sentencing manipulation, stating "the status of each doctrine (sentencing manipulation and sentencing entrapment) in this circuit is unclear. We make no attempt to decide their status today..." Id. The sentencing court also realized that a reverse sting operation of this caliber was an "extraordinary circumstance." Yet both adjudicating bodies have refused to depart downward based upon the government's role in the reverse sting.

This case is an aberration because it involves a scenario that was not explicitly contemplated by the Sentencing Guidelines Commission. Application Note 15 is dispositive; it portrays a situation in which the defendant buys the drugs and the government sets the price. The district court has inferred that Application Note 15 was not applicable in instances where the defendant steals the drugs and the government sets the bait. The commission never foresaw such an anomalous situation and the guidelines provide for a downward departure in such cases where the court finds an aggravating circumstance of a type or degree that the commission did not adequately consider. 18 U.S.C. § 3553(b) (1994).

Whether a "reverse sting" theft operation falls under either Application Note 15 or U.S.S.G. § 5K2.0 is the issue here. This court must grant certiorari and clarify the precise application of sentencing entrapment and manipulation within the Guidelines—a question that has plagued the Federal Circuits ever since the promulgation of Application Note 15. If sentencing entrapment escapes the rubric of the Guidelines, then it is clear that it falls outside the contemplation of the Commission. Whether the court invokes Application Note 15, or these particular circumstances fall outside the contemplation of the commission, Mr. Medina is entitled to a two-point reduction in his base level.

Point IV

SENTENCING SHOULD CORRESPOND TO A DEFENDANT'S CULPABILITY NOT BY THE AMOUNT OF "BAIT" SET BY THE GOVERNMENT.

Under the guidelines, quantity drives sentencing and thus directly affects a defendant's sentence exposure. In cases involving reverse stings, a governmental agent completely controls the quantity of contraband in question. Such a system allows for manipulation of a guideline base level based upon a governmental whim. As a result, the commission amended the guidelines to account for sentencing manipulation. See United States v. Staufer, 38 F.3d 1103, 1107 (9th Cir. 1994).

Courts have interpreted both Amendment Application Note 12 and 15 to imply that consideration must now be given to the predisposition and capacity of a defendant to engage in a deal of the magnitude for which he or she was convicted. Id. at 1107. Sufficient proof can be deduced from this record, which shows that Medina's prior drug thefts involves stealing amounts of contraband that were considerably lower than the amount set by the government in the instant case.

It is unequitable to allow the government to enhance punishment by enticing individuals into committing crimes when the quantity of the "bait" is completely controlled by the

government. Some mitigation in sentencing is required. This court must recognize the inequity in punishing individuals during these operations by taking an affirmative position under the Guidelines and allow for a downward departure in such cases.

The Second Circuit has ambivalently confronted this issue and has respectfully invited a higher authority to answer. See Caban, at footnote 1. The equitable conclusion would be to either set an initial base level of 34 (applying U.S.S.G. § 2D1.1 at the level that Medina was capable of committing the crime), or depart downward two-points from the current level based of thirty-six based on the government's unconscionable conduct. In either case, the court should still account for the four-point reduction based on acceptance of responsibility. To do otherwise would contradict not only basic retributivist principles of just deserts and culpability, but also certain axioms of statutory interpretation that allow for such a departure. See § 5K2.0, § 2D1.1 Note 12 and 15.

Point V

THE FEDERAL CIRCUIT COURTS ARE CONFLICTED OVER THE ISSUE OF SENTENCING MANIPULATION AND ENTRAPMENT. THEREFORE, THESE ISSUES NEED TO BE ADDRESSED BY THIS COURT.

The cases plaguing the Federal Circuits concerning sentencing entrapment and manipulation needs to be addressed by this court. Not only do the various circuit courts have suspicions with regards to the validity of these doctrines,[3] but the factual

---

[3]The Fourth, Seventh, Eighth, Ninth and Eleventh Circuits all have endorsed some form of departure based upon sentencing manipulation. See United States v. Jones, 18 F.3d 1145, 1154 (4th Cir. 1994); United States v. Messino, 55 F.3d 1241, 1256 (19xx); United States v. Warren, 16 F.3d 247, 251 (8th Cir. 1994); United States v. Baker, 63 F.3d 1478, 1500 (9th Cir. 1995), cert denied, 116 S. Ct. 824 (1996); and United States v. Edenfield, 995 F.2d 197, 199-200 (11th Cir. 1993, cert denied, 116 S. Ct. 824 (1996). The other circuits are apathetic or

circumstances associated with their respective cases are extremely unconscionable. Only one circuit to date has recognized the existence of sentencing manipulation and entrapment; the others have aimlessly pondered over the extent to which governmental agencies can so readily augment the sentencing of drug offenders.

In United States v. Knecht, 55 F.3d 54 (1995), Hannelore Knecht pleaded guilty to money laundering in violation of 18 U.S.C. § 1956(a)(3)(b). Knecht was sentenced to 51 months imprisonment, based in part on an enhancement of her sentencing under the guidelines. The fact that she was aware that the money laundered was derived from drug transactions augmented her sentence. The unconscionable aspect here is that, after negotiations had been commenced by both Knecht and the government, the undercover agent offered a gratuitous statement that the money involved was from drugs. Id. at 55. A few simple words permitted the government to increase her sentence significantly.

Other salient examples exist as to unfair situations in which prosecutors and undercover agents manipulate sentences. See United States v. Staufer, 38 F.3d 1103 (9th Cir. 1994)(where the court heard evidence pertaining to an informant consistently calling the defendant, up to the point of harassment, to make a deal); United States v. Genao, 831 F.Supp 246 (S.D.N.Y. 1993), affirmed in relevant part sub nom, (where a minor participant was arrested after she had been indirectly involved in over 7.3

---

confused. Basically, the courts have adopted the standard for a sentencing manipulation claim; a reduction in sentencing is warranted if the government conduct is "outrageous." Moreover, they have held under a sentencing entrapment *defense* (emphasis added), "outrageous government conduct" is a violation of due process and cannot warrant a conviction. However, applying the same standard to fundamentally different concepts is logically invalid—it makes sentencing mitigation under an entrapment theory extremely difficult to reach. The cases cited in this brief relate to many egregious circumstances where the government has enticed a defendant to commit greater crimes. However, by using the "outrageous conduct standard," courts admit there is a problem but rarely find that one exists.

Kilograms of crack). See also United States v. Barth, 990 F.2d 422 (8th Cir.1993)(where the police offered crack rather than cocaine to increase the sentence even though the type of drug does nothing to assist in investigation) and United States v. Cannon, 886 F. Supp. 705 (D.N.D. 1995)(where, despite the defendants reluctance, the police offered machine guns in addition to handguns and by using persuasive salesmanship got the defendant's to buy the automatic weapons).

This court must address the disparity within the Federal Circuits and warrant mitigation in sentencing where such unconscionable behavior persists. For the foregoing reasons, the petitioner requests that this writ be granted so that a two-point reduction in sentence from the base level can be granted. By starting at an initial base level of 36, reducing it six points, (4 for acceptance of responsibility and 2 for the manipulation by the government), and then accounting for a level VI Criminal History, the correct incarceration period should be 168 to 210 months. In the alternative, if this court does not take into account any governmental misconduct, sentence should still be reduced by taking into account the defendant's culpability and previous drug thefts and setting the initial base level at 34. Either way, the same result occurs.

CONCLUSIONS

FOR THE FOREGOING REASONS, THIS COURT SHOULD REMAND TO THE LOWER COURT FOR A RECALCULATION OF MEDINA'S SENTENCE UNDER THE FEDERAL SENTENCING GUIDELINES TAKING INTO ACCOUNT BOTH SENTENCING MANIPULATION OR ENTRAPMENT CLAIMS AND ACCEPTANCE OF RESPONSIBILITY.

Dated: July 5, 1999

Respectfully Submitted,

PATRICK JOYCE
Fasulo, Freidson & Joyce
Attorney for Petitioner
Vincente Medina
233 Broadway
Suite 780
New York, NY 10020
212-566-7299

APPENDIX A

JUDGMENT AND OPINION
OF THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

173 F.3d 89
(Cite as: 173 F.3d 89)

UNITED STATES of America, Appellee,

v.

Miguel CABAN; Mark A. Tiwary; Franklyn Gonzalez, Defendants,
Eric Calderon; Vicente Medina, aka Pedro Pablo Contrera, Defendants-Appellants.

No. 1066, Docket Nos. 98-1204 (L), 98-1205 (CON).

United States Court of Appeals,
Second Circuit.
Argued Dec. 11, 1998.
Decided April 12, 1999.

Defendant was convicted by jury in the United States District Court for the Eastern District of New York, Reena Raggi, J., of conspiracy, attempt to possess cocaine with intent to distribute, and use of firearm during and in relation to drug trafficking crime, and codefendant pleaded guilty to conspiracy to possess cocaine with intent to distribute and use of firearm during and in relation to drug trafficking crime. Defendants appealed. The Court of Appeals, Jacobs, Circuit Judge, held that: (1) jurisdiction
did not exist to review refusal to depart downward in sentencing on grounds that arrest arose from reverse sting operation; (2) relying on defendant's conduct evidencing his intent to steal 50 kilograms of cocaine to calculate his base offense level was not plain error, even though government controlled quantity of drugs involved in reverse sting operation; and (3) instruction that defendant's motive was irrelevant, so long as his knowledge of and intent to commit crime was established beyond a reasonable

doubt, was warranted.

Affirmed in part; appeal dismissed in part.

[1] CRIMINAL LAW k1023(11)
110k1023(11)
Court of Appeals lacked jurisdiction to review district court's refusal to depart downward from Sentencing Guidelines range on grounds that arrest arose from reverse sting operation in which government had control over amount of drugs involved, given that district court recognized its authority to depart and its refusal to do so was not prompted by impermissible consideration or error of law, that defendant's actions evidenced intent to steal all real and sham cocaine involved in reverse sting operation, and that court correctly calculated defendant's offense level. U.S.S.G. s 1B1.1 et seq., 18 U.S.C.A.

[2] CRIMINAL LAW k1042
110k1042
Court of Appeals would review only for plain error or defects affecting substantial rights challenge to calculation of defendant's base offense level that was not raised at sentencing. Fed.Rules Cr.Proc.Rule 52(b), 18 U.S.C.A.; U.S.S.G. s 1B1.1 et seq., 18 U.S.C.A.

[3] CRIMINAL LAW k1042
110k1042
Relying on defendant's conduct evidencing his intent to steal 50 kilograms of cocaine to calculate his base offense level under Sentencing Guidelines was not plain error, even though government controlled quantity of drugs involved in underlying reverse sting operation, particularly when district court sought to offset any potential for prosecutorial overreaching by departing additional two levels for acceptance of responsibility. Fed.Rules Cr.Proc.Rule 52(b), 18 U.S.C.A.; U.S.S.G. s 2D1.1(c), 18 U.S.C.A.

[4] CRIMINAL LAW k822(1)
110k822(1)
Court of Appeals generally reviews challenged jury instructions de novo, reversing only if the charge, taken as a whole, was prejudicial.

[4] CRIMINAL LAW k1139
110k1139
Court of Appeals generally reviews challenged jury instructions de novo, reversing only if the charge, taken as a whole, was prejudicial.

[5] CRIMINAL LAW k772(5)
110k772(5)
Instruction that defendant's motive was irrelevant, so long as his knowledge of and intent to commit crime was established beyond a reasonable doubt, was warranted when defendant failed to show that he lacked opportunity to end his involvement in offense and warn police, and thus was not entitled to assert duress defense, but testified that he participated in offense as result of threats.

[6] CRIMINAL LAW k38
110k38
A duress defense requires, inter alia, defendant's showing that there was no reasonable opportunity to escape the threat other than by engaging in the unlawful activity.

[7] CRIMINAL LAW k772(6)
110k772(6)
To be entitled to a duress instruction, defendant must present some evidence on all of the elements of the defense, including the distinct element of lack of a reasonable opportunity to escape the threatening situation. *90 John H. Jacobs, New York, NY (Elizabeth Macedonio, on the brief), for Appellant Eric Calderon. Michael Hurwitz, New York, NY (Hurwitz Stampur & Roth, on the brief), for Appellant Vincente Medina. Stuart M. Altman, Assistant United States Attorney, Brooklyn, NY (Zachary W.

Carter, United States Attorney, Eastern District of New York; Emily Berger, Assistant United States Attorney, on the brief), for Appellee.

Before: WINTER, Chief Judge, JACOBS and POOLER, Circuit Judges.

JACOBS, Circuit Judge:

Defendants-appellants Eric Calderon and Vincente Medina were arrested while stealing 50 kilograms of real and "sham" cocaine during a reverse sting operation, and were convicted of various narcotics and weapons offenses in the United States District Court for the Eastern District of New York (Raggi, J.). Calderon appeals both his conviction and sentence, after jury trial, on one count each of conspiracy and attempt to possess cocaine with intent to distribute, in violation of 21 U.S.C. ss 841 and 846, as well as one count of use of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. s 924(c)(1); he argues that the district court erred in instructing the jury not to consider his motive for committing the crime, and in denying his application for a downward departure. Medina appeals his sentence after a guilty plea on one count of conspiracy to possess cocaine with intent to distribute and one count of use of a firearm during and in relation to a drug trafficking crime; he argues that the district court erred in considering the sham cocaine in the drug-quantity computation used to arrive at his base offense level.

We affirm Medina's sentence and Calderon's judgment of conviction. We dismiss Calderon's appeal of his sentence for lack of appellate jurisdiction.

BACKGROUND

In or around December 1996, the New York Drug Enforcement Task Force ("NYDETF") commenced an investigation of an individual named Miguel Caban, after having

learned from a confidential informant ("CI") that Caban was the leader of a ring that was robbing drug stash houses. The NYDETF set up a sting, using a second CI to approach Caban with an opportunity for a similar robbery. The second CI informed Caban that up to 50 kilograms of cocaine would be at a stash house, and Caban's group would be entitled to 50% of the take. Caban agreed to the robbery, and enlisted several individuals to assist--including appellants Calderon and Medina--promising five kilograms of the take to each man.

On March 27, 1997, Caban, Calderon, Medina, and their co-conspirators arrived at their target--a Brooklyn warehouse--in which the NYDETF had placed 5 kilograms of cocaine, 45 kilograms of a substance resembling cocaine, and several surveillance cameras. Calderon had *91 brought along two guns in his car, and handed them to Caban and Medina; Calderon had armed himself with a knife.

Shortly after the group entered the warehouse and commenced packaging the cocaine, they were arrested by agents of the NYDETF. Calderon and Medina were charged with conspiracy and attempt to possess cocaine with intent to distribute, as well as with use of a firearm during and in relation to a drug trafficking crime. Medina pled guilty to the conspiracy and firearms charges. At his sentencing, the district court considered all 50 kilograms (real and sham cocaine) in determining his base offense level on the conspiracy charge. Under Section 2D1.1 of the United States Sentencing Guidelines, U.S.S.G. s 2D1.1, that quantity corresponds to an offense level of 36. The district court took note that the government had in effect predetermined this offense level by stocking the warehouse, and found that the usual two-level departure for acceptance of responsibility did not adequately account for "these extraordinary circumstances." The district court thus downwardly departed four levels to an offense level of 32. Factoring in Medina's criminal history level of VI, the district court sentenced him to 210 months of incarceration on the conspiracy charge, 60 months of incarceration (consecutive) on the firearms charge, 5 years of supervised release, and a $200 special assessment. Calderon decided to proceed with a jury trial

and intended to present a duress defense, arguing that he participated in the robbery out of fear that Caban would kill him if he refused. However, the court granted the government's motion in limine to preclude this defense, on the ground that absent proof that Calderon lacked the opportunity to warn the police, the supporting facts were legally insufficient to establish duress.

Despite the court's ruling in limine, Calderon began testifying at trial that Caban had forced him to commit the robbery. The court promptly excused the jury and offered Calderon a choice: he could either (i) conform to the Court's pretrial ruling and make no reference to Caban's alleged threats or (ii) testify in disregard of the ruling, but accept a jury instruction that the Court had already rejected his duress defense on legal grounds. Calderon chose the latter. Calderon then proceeded to testify that he was threatened, that he lacked advance knowledge of the March 27 robbery attempt or of the volume of cocaine at the warehouse. This testimony was contradicted by Caban, who testified that Calderon was a willing participant in the robbery attempt and had prior knowledge of the robbery before arriving at the warehouse. In charging the jury, the district court decided that an additional instruction would be needed to prevent the jury from erroneously accepting Calderon's thinly-disguised duress defense. The now-challenged instruction stated: [T]he government is not required to prove motive in this case. Motive can, however, sometimes be considered in determining if knowledge and intent have been proved. But I caution you that if knowledge and intent are proved beyond a reasonable doubt, that proof is not defeated by evidence of some mitigating motive. So in this case, if you are otherwise convinced beyond a reasonable doubt that the defendant did understand the nature of conduct he engaged in and did intend to do acts that the law forbids, the claim that he acted out of fear would not alter the fact that his conduct was knowing and intentional[ ].

In formulating its charge, the district court allowed Calderon's counsel to present any caselaw holding that a fear motive could trump otherwise sufficient proof of knowledge and

intent, but none was presented. The jury convicted Calderon on all counts. At his sentencing, Calderon sought a downward departure because his conviction resulted from a reverse sting in which *92 the government had unique control over the quantity of cocaine placed in the warehouse. In essence, Calderon argued that the entire 50 kilograms of real and sham cocaine should not be attributed to him. The district court noted that it possessed the authority to so depart in the right circumstances, but declined to do so because Calderon and his group were already in the process of stealing the packages of cocaine when they were arrested:

I consider it highly probative that both of these defendants were actually involved in starting to move some of these drugs when they were arrested. This is why I said ... that but for the arrest all the evidence shows me that they would have been out the door with the drugs in the car and would have distributed them. After computing Calderon's offense level of 36 and his criminal history level of I, the district court sentenced him to 188 months of incarceration on the conspiracy and attempt charges, 60 months of incarceration (consecutive) on the firearms charge, 5 years of supervised release, and a $300 special assessment.

DISCUSSION

A. Guidelines Calculation

Calderon appeals the denial of his application for a downward departure; Medina appeals the calculation of his base offense level. Their arguments are substantively the same.

1. Calderon

[1] Because the district court recognized its authority to downwardly depart in reverse sting cases, but chose not to do so, we lack appellate jurisdiction to consider Calderon's appeal on this issue "absent a showing that a violation of law occurred or that the guidelines were misapplied." United States v. Adeniyi, 912 F.2d 615, 618 (2d Cir.1990); see also United States v. Ekhator, 17 F.3d

53, 55 (2d Cir.1994). Here, the district court's ruling was not prompted by any impermissible consideration or error of law; the court recognized its power to depart. Moreover, the Guidelines were not misapplied; Calderon's actions evidenced an intent to steal all 50 kilograms of real and sham cocaine, and the court correctly calculated Calderon's offense level. We therefore dismiss Calderon's appeal of his sentence for lack of jurisdiction.

2. Medina

[2][3] Medina failed to object at sentencing to the district court's calculation of his base offense level; his argument is therefore waived on appeal absent "[p]lain errors or defects affecting substantial rights." Fed.R.Crim.P. 52(b); see also United States v. Taylor, 92 F.3d 1313, 1335 (2d Cir.1996), cert. denied, 519 U.S. 1093, 117 S.Ct. 771, 136 L.Ed.2d 717 (1997); United States v. Keppler, 2 F.3d 21, 23-24 (2d Cir.1993). Section 2D1.1(c) of the Sentencing Guidelines requires the sentencing court to calculate a defendant's base offense level on the basis of the drug quantity involved in the transaction--including theft--in which the defendant agreed or intended to engage. See U.S.S.G. s 2D1.1(c) (1997); United States v. Howard, 998 F.2d 42, 50 (2d Cir.1993). Application Note 15 of this section provides for a downward departure in a particular reverse sting situation that is not at issue here:

If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.

*93 U.S.S.G. s 2D1.1, comment. (n.15) (1997). Medina implicitly

argues that we should expand Application Note 15 to fit this case because the Guidelines calculation was dependent upon the amount of cocaine that the NYDETF placed in the warehouse, rather than any intent he may have formed; he argues that the district court should have considered only the amount of cocaine that he and his co-conspirators were reasonably capable of obtaining without government intervention, and computed his offense level accordingly.
[FN1]

FN1. This argument parallels the "sentencing manipulation" and "sentencing entrapment" doctrines referenced in United States v. Gomez, 103 F.3d 249, 256 (2d Cir.1997), and United States v. Knecht, 55 F.3d 54, 57 (2d Cir.1995). " 'Sentencing manipulation' has been described as occurring 'when the government engages in improper conduct that has the effect of increasing the defendant's sentence.' " Gomez, 103 F.3d at 256 (quoting United States v. Okey, 47 F.3d 238, 240 (7th Cir.1995)). Sentencing entrapment "normally 'requires that a defendant convince the fact-finder that government agents induced her to commit an offense that she was not otherwise predisposed to commit.' " Knecht, 55 F.3d at 57 (quoting United States v. Cuervelo, 949 F.2d 559, 565 (2d Cir.1991)); see also United States v. Connell, 960 F.2d 191, 196 (1st Cir.1992) ("We can foresee situations in which exploitative manipulation of sentencing factors by government agents might overbear the will of a person predisposed only to committing a lesser crime."). As we stated in Gomez, however, the status of each doctrine in this Circuit is unclear. See Gomez, 103 F.3d at 256. We make no attempt to decide their status today, as Medina could not successfully raise either defense on the facts of this case.

Whatever appeal this argument may have in other circumstances, the district court did not commit plain error in treating as dispositive conduct by Medina that evidenced his intent to steal 50 kilograms of cocaine. Before entering the warehouse, he knew that as many as 50 kilograms of cocaine would be inside; upon entering the warehouse, he saw what appeared be 50

kilograms of cocaine; while inside the warehouse, he participated in the attempt to steal all 50 kilograms. At no point did Medina attempt to withdraw from the conspiracy, or attempt to steal any less than the full haul available in the warehouse. Medina was one of the several men who had brought weapons and vehicles with which to take possession of any drugs they found inside the warehouse.

It is unsettling that in this type of reverse sting, the government has a greater than usual ability to influence a defendant's ultimate Guidelines level and sentence. It appears to be no coincidence that the NYDETF chose to place no less than 50 kilograms of real and sham cocaine in the warehouse; in Medina's case, the difference in offense levels between 49.9 kilograms and 50 kilograms under U.S.S.G. s 2D1.1 potentially could entail as much as 78 months of incremental imprisonment. [FN2] But we have no ability to force a downward departure as a matter of law. Moreover, the district court undertook to offset any potential for prosecutorial overreaching by departing an additional two levels for acceptance of responsibility, expressly noting that the weight of the drugs made the Guidelines level too severe for the usual two- level departure to correct.

FN2. Under the Guidelines, a defendant who has an offense level of 36 (for stealing at least 50 but less than 150 kilograms of cocaine) and a Criminal History Category of VI qualifies for a sentencing range of between 324 and 405 months of imprisonment. A defendant with an offense level of 34 (for stealing at least 15 but less than 50 kilograms of cocaine) and the same Criminal History Category qualifies for a sentence of between 262 and 327 months of imprisonment. Assuming the district judge were to sentence both defendants to the highest amount of incarceration within their ranges, the difference in sentences would be 78 months' imprisonment. (Of course, the difference would be much greater--143 months' imprisonment--if the judge were to sentence the first defendant to the highest amount and the second to the lowest.)

The current Sentencing Guidelines recognize a potential for abuse in reverse stings, but address only the situation in which the government stretches the defendant's limited resources--and increases *94 the quantity involved in the drug transaction--by discount pricing. We invite the Sentencing Commission's attention to some more comprehensive measure that would consider what happens when a reverse sting involves a theft in which the government sets the bait (rather than a purchase in which the government sets the price).

B. Jury Instruction

[4][5] Calderon argues that the district court erred by instructing the jury that Calderon's motive was irrelevant so long as his knowledge of and intent to commit the crime had been established beyond a reasonable doubt. We generally review challenged jury instructions de novo, reversing only if the charge, taken as a whole, was prejudicial. See United States v. Bok, 156 F.3d 157, 160 (2d Cir.1998); United States v. Locascio, 6 F.3d 924, 939 (2d Cir.1993).

[6][7] The challenged instruction was sound. A duress defense requires (inter alia) the defendant's showing that there was no reasonable opportunity to escape the threat other than by engaging in the unlawful activity. See United States v. Podlog, 35 F.3d 699, 704 (2d Cir.1994); United States v. Stevens, 985 F.2d 1175, 1181 (2d Cir.1993); United States v. Alicea, 837 F.2d 103, 106 (2d Cir.1988). In order to be entitled to a duress instruction, "[a] defendant must present some evidence on all of the elements of the defense, including the distinct element of lack of a reasonable opportunity to escape the threatening situation." Podlog, 35 F.3d at 704 (quoting United States v. Bakhtiari, 913 F.2d 1053, 1057-58 (2d Cir.1990)) (internal quotation marks omitted).

Calderon fails to meet this burden. He had several opportunities to end his involvement in the conspiracy and warn the police, but he did not do so. Accordingly, the district court barred him from presenting a duress defense--both in its pretrial

ruling and its curative jury instruction; neither ruling was error, cf. id. ("Absent such a showing, the district court need not submit the defense to the jury.").

CONCLUSION

For the aforementioned reasons, we affirm Calderon's judgment of conviction and Medina's sentence. Calderon's challenge to his sentence is dismissed.

APPENDIX B

JUDGEMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

VS.

VICENTE MEDINA, aka, PEDRO PABLO CONTRERAS

JUDGMENT INCLUDING SENTENCE FOR OFFENSES COMMITTED ON OR AFTER NOVEMBER 1, 1987 CASE NO.: CR 97-0337 (RR)

STAURT ALTMAN Assistant US Attorney | D. PERREIRA (CR) Court Reporter | MICHAEL HURWITZ, ESQ., Defendant's Attorney

The defendant **VICENTE MEDINA, aka, PEDRO PABLO CONTRERAS** pleaded guilty to counts 1 and 3 of the superseding indictment. Accordingly, the defendant is ADJUDGED guilty of such Count(s), which involve the following offenses.

TITLE AND SECTION	NATURE AND OFFENSE	COUNT NUMBERS
21 U.S.C. 846 AND 841	CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE COCAINE	COUNT 1
318 U.S.C. 924 8 (1)	USE OF A FIREARM IN CONNECTION WITH DRUG TRAFFICKING CRIME	COUNT 3

The defendant is sentenced as provided in pages 2 through 5 of the Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1988.

X The defendant is advised of his/her right to appeal withing ten (10) days.

The defendant has been found not guilty on count(s) and discharged as to such count(s).

X Open counts are dismissed on the motion of the United States.

The mandatory special assessment is included in the portion of Judgement that imposes a fine.

X It is ordered that the defendant shall pay to the United States a special assessment of $200.00 which shall be due immediately.

It is further **ORDERED** that the defendant shall notify the United States Attorney for this District within 30 days of any change of residence or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid.

APRIL 3, 1998

48227-053 -- 6/21/1965

Date of Imposition of sentence

Defendant's USM #/ Date of Birth
NONE
Defendant's Soc. Sec. Number

REENA RAGGI, U.S.D.J.

530 WEST 140 STREET, APT 35
NEW YORK, NEW YORK 10027
Defendant's mailing address

APRIL 3, 1998
Date of Signature

DEFENDANT: VICENTE MEDINA,
aka, PEDRO PABLO CONTRERAS
JUDGMENT - PAGE 2 OF 5
CASE NUMBER: CR 97-0337 (RR)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of: TWO HUNDRED THEN (210) MONTHS ON COUNT 1, AND SIXTY (60) MONTHS ON COUNT 3 TO RUN CONSECUTIVE WITH COUNT 1 FOR A TOTAL OF TWO HUNDRED SEVENTY (270) MONTHS.

____ The defendant asks to be housed at ____. The court notes this so that the Bureau of Prisons can accommodate his/her request if space permits.

____ The defendant is remanded to the custody of the United States Marshal.

____ The defendant shall surrender to the United States Marshal for this District.

____ The defendant shall surrender for service of sentence at the institution designed by the Bureau of Prisons.

_____12:00 noon _____.
_____As notified by the United States Marshal.
_____As notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this Judgment.

_____
United States Marshal

By:_____

DEFENDANT: VICENTE MEDINA,
aka, PEDRO PABLO CONTRERAS
JUDGMENT - PAGE 3 OF 5
CASE NUMBER: CR 97-0337 (RR)

SUPERVISED RELEASE

Upon release from Imprisonment, the defendant shall be on supervised release for a term of: FIVE (5) YEARS ON COUNT 1 AND THREE 93) YEARS ON COUNT 3 TO RUN CONCURRENTLY.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another Federal, State, or Local crime and shall comply with the standard conditions that have been adopted by this Court (Seaforth on the following page).

The defendant shall not illegally possess a controlled substance.

If this Judgment imposes a restitution obligations, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

_____ The defendant shall pay any fines that remains unpaid at the commencement of the term of supervised release.

DEFENDANT: VICENTE MEDINA,
aka, PEDRO PABLO CONTRERAS

CASE NUMBER: CR 97-0337 (RR)

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) The defendant shall support his or her dependants and meet other family responsibilities;

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons:

6) The defendant shall notify the probation officer within 10 days prior to any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substance, except as prescribed by a Physician;

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) The defendant shall notify the probation officer withing 72 hours of being arrested or questioned by a law enforcement officer;

12) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court;

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

BEST AVAILABLE COPY

DEFENDANT: VICENTE MEDINA,
aka, PEDRO PABLO CONTRERAS
JUDGMENT - PAGE 3 OF 5
CASE NUMBER: CR 97-0337 (RR)

STATEMENT OF REASONS

X The Court adopts the factual findings and guideline application in the presentence report.

____ The Court adopts the factual findings and guideline application in the presentence report except:
Amendments to the report

1)

GUIDELINES RANGE DETERMINATION BY THE COURT

Total offense Level: 34

Criminal History Category: VI

Imprisonment Range: 262-327

Supervised Release Range: 5 years required

Fine Range: $17,500.00 TO $4,000,000.00

Restitution Range $ N/A TO
$_____

Special Assessment: $200.00

DEPARTURES FROM THE GUIDELINES RANGE

____ The sentence is within the guideline range, that range DOES NOT EXCEED 24 months, and the court finds no reason to depart form the sentence called for by the application of the guidelines.

OR

____ The sentence is withing the guideline range, that range EXCEEDS 24 months, and the sentence is imposed for the following reasons:

____ The Court makes a DOWNWARD DEPARTURE pursuant to U.S.C.G. Section 5K1.1

_X_ Other reasons for departure:
Because on the totality of the circumstances of the nature of the offense, namely a reverse sting operation where the government set the amount of drugs, do not adequately represent the benefits of the guilty plea, the court takes a 2 point reduction.